identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: JUN 27 2011 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturer of transportation and telecommunications equipment. It seeks to employ the beneficiary permanently in the United States as a general manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's August 28, 2008 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on June 12, 2007. The proffered wage as stated on the ETA Form 9089 is $52.88 per hour ($109,990.40 per year). The ETA Form 9089 states that the position requires a master's degree in mechanical engineering, and 36 months of experience in the job offered or 36 months of experience in the alternate occupation of operations manager.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The evidence in the record of proceeding shows that the petitioner is structured as a limited liability company. On the petition, the petitioner claimed to have been established in 1976 and to currently employ 308 workers. On the ETA Form 9089, signed by the beneficiary on July 17, 2007, the beneficiary claimed to have worked for the petitioner as a general manager from October 2, 2006 to September 30, 2007, and as a product line manager from October 1, 2004 to October 1, 2006.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The petitioner did not submit its annual reports, federal tax returns, or audited financial statements for any relevant year.[2] On appeal, the petitioner's counsel states that the petitioner is wholly owned by [redacted], a subsidiary of [redacted].[3] He asserts that the petitioner and [redacted] are financially and legally one company and, therefore, that USCIS should consider the audited financial statements of [redacted] in its determination of the petitioner's ability to pay the proffered wage. He states that the petitioner does not file income tax returns and that its income is consolidated and reported in the tax returns of [redacted]. He submits a letter of credit issued by Bank of America, N.A. on May 20,

---

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] The petitioner submits bank statements for [redacted] on appeal. [redacted] appears to be a separate entity from the petitioner. [redacted] is a Delaware corporation that qualified to do business in Illinois on May 21, 1980. *See* http://apps.ilsos.gov/corporatellc/CorporateLlcController (accessed June 22, 2011).

[3] Pursuant to a letter dated September 25, 2008, from [redacted] the petitioner is owned 100% by [redacted] which in turn is owned 98% by [redacted]. The letter confirms that [redacted] is the payer of the proffered wage in the instant case.

2009, to [redacted] on behalf of the petitioner and asserts that it "clearly demonstrates [redacted] undertaking of significant financial and legal obligations on behalf of [the petitioner]." He cites an Operational Services Agreement between [redacted] and the petitioner which states that [redacted] shall be solely liable for all wages and [redacted] benefits due to its employees. He submits a letter from [redacted] dated January 19, 2010, which states that "[b]ecause of the ownership and control [redacted] exerts over [redacted] and [the petitioner], these entities are shown in the consolidated GAAP audited financial statements of [redacted] Counsel further asserts that under the concept of veil-piercing, a member of the LLC may be held liable for the debts of the LLC.

Because a limited liability company is a separate and distinct legal entity from its members, the assets of its members or of other entities cannot be considered in determining the petitioning company's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). USCIS may not pierce the veil of the LLC and hold its member, [redacted], or [redacted] liable for the petitioner's debts.

However, counsel submits an Amended and Restated Operational Services Agreement dated December 31, 2002, between the petitioner and [redacted]. Pursuant to the Amended and Restated Operational Services Agreement, [redacted] "agrees to provide and make available personnel to assist [the petitioner] in the conduct of its Business."[4] The Amended and Restated Operational Services Agreement further states at Paragraph 6:

> All Personnel shall remain employees of [redacted] and subject to its exclusive direction and control. [redacted] shall be responsible for the recruiting, hiring, training, promotion, assignment, supervision, management and discharge of all Personnel.... The parties acknowledge and agree that all Personnel performing Services, whether on site at [the petitioner's] premises or not, shall at all times be solely the employees of [redacted] and at no time shall such personnel be deemed to be employees of [the petitioner]. Without limiting the generality of the foregoing, the parties agree as follows:
>
> (a) [redacted] shall be solely liable for all wages and other compensation and benefits due to employees, all employers and withholding taxes related thereto and all workers' compensation coverage.

Based on the Amended and Restated Operational Services Agreement, [redacted] is solely liable for all wages and other compensation and benefits due to its employees, all employers and withholding taxes related thereto and all workers' compensation coverage. Therefore, the AAO will analyze the audited financial statements of [redacted] in its determination of the petitioner's ability to pay the proffered wage, as [redacted] is contractually obligated to pay the proffered wage.

---

[4] Paragraph 1 of the Agreement.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2007 or subsequently. However, the petitioner provided IRS Form W-2 issued by [redacted] to the beneficiary for 2007.[5] The petitioner also provided paychecks issued by [redacted] to the beneficiary in April, May and June of 2007. In 2007, MacLean-Fogg Company paid the beneficiary $129,857.49, an amount greater than the proffered wage. Therefore, the petitioner has established its ability to pay the proffered wage in 2007. The petitioner must establish its ability to pay the full proffered wage in 2008.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash

[5] The petitioner also provided IRS Form W-2 issued by [redacted] to the beneficiary for 2006. However, the priority date in the instant case is in 2007. Evidence preceding the priority date is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

> expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The audited financial statement for [redacted] and its subsidiaries demonstrates a net loss of ($14,663,000) for 2008. Therefore, for the year 2008, the petitioner did not establish that it had sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[6] If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The audited financial statement for [redacted] and its subsidiaries demonstrates end-of-year net current assets of $99,200,000 for 2008. Therefore, for the year 2008, the petitioner established that it had sufficient net current assets to pay the proffered wage.

Therefore, the evidence submitted establishes that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

---

[6]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

However, beyond the decision of the director,[7] the petitioner has not established that it will be the beneficiary's employer and was authorized to file the instant petition. On March 21, 2011, the AAO sent the petitioner a Notice of Intent to Deny (NOID), which stated in part:

> The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(2), or 203(b)(3) of the Act." In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3 states:
>
> Employer means:
> (1) A person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an ``authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an Application for Permanent Employment Certification filed on behalf of an independent contractor.
>
> In this case, the petitioner has failed to establish that it will actually employ the beneficiary. The petitioner submits on appeal an Amended and Restated Operational Services Agreement (Agreement) dated December 31, 2002, between the petitioner and [redacted] Pursuant to the Agreement, [redacted] "agrees to provide and make available personnel to assist [the petitioner] in the conduct of its Business."[8] The Agreement further states at Paragraph 6:
>
> All Personnel shall remain employees of [redacted] and subject to its exclusive direction and control. [redacted] shall be responsible for the recruiting, hiring, training, promotion, assignment, supervision, management and discharge of all Personnel.... The parties acknowledge and agree that all Personnel performing Services, whether on site at [the petitioner's] premises or not, shall at all times be solely the employees of [redacted] and at no time shall such personnel be deemed to be employees of [the petitioner]. Without limiting the generality of the foregoing, the parties agree as follows:

---

[7] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

[8] Paragraph 1 of the Agreement.

(a) [redacted] shall be solely liable for all wages and other compensation and benefits due to employees, all employers and withholding taxes related thereto and all workers' compensation coverage;
(b) [redacted] shall be solely responsible for and shall have sole authority for the interviewing, hiring, promoting, demoting, firing, disciplining and reviewing of personnel;
(c) [redacted] retains the right, at any time, for any reason whatsoever, to remove and replace any personnel; provided, however, [the petitioner] shall have the right to demand the removal of any individual from its account; and
(d) [redacted] shall be responsible as to the results to be accomplished and the means and details of the personnel accomplishing those results; provided, however, that [redacted] does not guarantee any particular result, economic or otherwise.

Further, in a letter dated January 19, 2010, from [redacted] and Joseph [redacted] partners at [redacted] and [redacted] state that [redacted] makes available the services of employees necessary to operate the petitioner's business. The letter states that the beneficiary is an employee of [redacted] who performs services for the petitioner.[9] It is not clear from the record if the petitioner employs anyone directly.

In determining whether there is an "employee-employer relationship," the Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

---

[9] The letter also states that the petitioner is 100% owned by [redacted] The majority shareholder of [redacted] is [redacted]

Darden, 503 U.S. at 323-324; *see also* Restatement (Second) of Agency § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In considering whether or not one is an "employee," USCIS must focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; New Compliance Manual at § 2-III(A)(1).

In the present matter, it is unclear that the petitioning entity, [redacted] pays any employee salaries, that it employs anyone directly, or that it will be the beneficiary's actual employer. Instead, it appears that [redacted] will be the beneficiary's actual employer.

In *Clackamas*, the specific inquiry was whether four physicians, actively engaged in medical practice as shareholders, could be considered employees to determine whether the petitioner to qualify as an employer under the American with Disabilities Act of 1990 (ADA), which necessitates an employer have fifteen employees. The court cites to *Darden* that "We have often been asked to construe the meaning of 'employee' where the statute containing the term does not helpfully define it." *Clackamas,* 538 U.S. at 444, (*citing Darden*, 503 U.S. at 318, 322). The court found

the regulatory definition to be circular in that the ADA defined an "employee" as "individual employed by the employer." *Id. (citing* 42 U.S.C. § 12111(4)). Similarly, in *Darden,* where the court considered whether an insurance salesman was an independent contractor or an "employee" covered by the Employee Retirement Income Security Act of 1974 (ERISA), the court found the ERISA definition to be circular and adopted a common-law test to determine who would qualify as an "employee under ERISA. *Id.* (*citing Darden*, 503 U.S. at 323). In looking to *Darden,* the court stated, "as *Darden* reminds us, congressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning in common law. Congress has overridden judicial decisions that went beyond the common law." *Id.* at 447 *(citing Darden*, 503 U.S. at 324-325).

The *Clackamas* court considered the common law definition of the master-servant relationship, which focuses on the master's control over the servant. The court cites to definition of "servant" in the Restatement (Second) of Agency § 2(2) (1958): "a servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of services is subject to the other's control or right to control."[10] *Id.* at 448. The Restatement additionally lists factors for consideration when distinguishing between servants and independent contractors, "the first of which is 'the extent of control' that one may exercise over the details of the work of the other." *Id. (citing* § 220(2)(a)). The court also looked to

---

[10] Section 220, Definition of a Servant, in full states:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

a. The extent of control which, by the agreement, the master may exercise over the details of the work;
b. Whether or not the one employed is engaged in a distinct occupation or business;
c. The kind of occupation, with reference to whether, in the locality, the work is usually done under the director of the employer or by a specialist without supervision;
d. The skill required in the occupation;
e. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
f. The length of time for which the person is employed;
g. The method of payment, whether by the time or by the job;
h. Whether or not the work is a part of the regular business of the employer;
i. Whether or not the parties believe they are creating the relation of master and servant; and
j. Whether the principal is or is not in business.

> the EEOC's focus on control[11] in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and that the EEOC considered an employer can hire and fire employees, assign tasks to employees and supervise their performance, can decide how the business' profits and losses are distributed. *Id.* at 449-450.

In response to the NOID, the petitioner's counsel asserts that under immigration law, the petitioner and its parent company, [redacted] are both authorized to file the Form I-140 petition. In his brief, the petitioner's counsel states that "the AAO overlooked the fact that as much as [redacted] *has control over* Beneficiary, *so does Metform.*" (emphasis in original). The petitioner's counsel asserts that the petitioner is the beneficiary's actual employer and was authorized to file the instant Form I-140 petition. He states that the petitioner and the beneficiary have an employee-employer relationship as defined by common law and that the petitioner and the beneficiary believed that they created a relationship of master and servant. He submits numerous documents which he claims establish that the petitioner also has control over the beneficiary, including the following:

- HR documents, training certification and vacation day requests. Counsel states that the beneficiary gained skills at the behest of the petitioner on the petitioner's premises as an employee of the petitioner; that the beneficiary attended training on the premises of the petitioner as an employee of the petitioner; that he had to be granted permission by the petitioner to take vacation days; that he had to be trained in a certain way to keep employment with the petitioner; that he had to acknowledge that he understood the petitioner's harassment policy; and that he was given an employee handbook explaining all of policies and procedures he must follow to remain an employee of the petitioner. Counsel did not provide the harassment policy or employee handbook which may have identified the beneficiary's actual employer but instead, he provided copies of documents indicating that the beneficiary received the harassment policy and employee handbook. The receipt notices do not establish that the beneficiary is an employee of the petitioner. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). A job announcement dated July 6, 2004, states that the beneficiary has joined [redacted]Europe" and that he "will ultimately assume the position of Formed and [redacted] working from Savanna, IL." This document does not establish that the beneficiary is an employee of the petitioner. The training evaluation forms and certificates show that the beneficiary took certain training courses at the Illinois Manufacturing Extension Center, but do not establish that he had to be trained in a certain way to keep employment with the petitioner, as counsel asserts. These documents do not establish that the beneficiary is an

[11] Additionally, as set forth in the recent Memorandum from Donald Neufeld, Associate Director, Service Center Operations, Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third Party Site Placements, HQ 70/6.2.8, January 8, 2010, the memo looks to whether the employer has the "right to control" where, when and how the beneficiary performs the job. The memo considers many of the factors set forth in *Darden, Clackamas,* and the Restatement, including who provides the tools necessary to perform the job duties, control to the extent of who hires, pays and fires, if necessary, the beneficiary, and who controls the manner and means by which the beneficiary's work product is completed.

employee of the petitioner. Further, counsel's assertion that the petitioner trains its own employees is contradicted by the Amended and Restated Operational Services Agreement dated December 31, 2002, between the petitioner and [redacted] which states that [redacted] is responsible for the recruiting, hiring, training, promotion, assignment, supervision, management and discharge of all employees.[12] The vacation request forms submitted by the petitioner are on the petitioner's letterhead and require a manager's approval. However, the Amended and Restated Operational Services Agreement states that [redacted] is responsible for the supervision and management of all employees, which would appear to include vacation requests. The petitioner has not resolved the inconsistencies between the documents provided in response to the NOID and the provisions of the Amended and Restated Operational Services Agreement dated December 31, 2002, between the petitioner and [redacted].[13]

Job application form. Counsel states that the petitioner hires its own employees, including assistants to the manager and vice president positions. Counsel states that as General Manager and Vice President of the petitioner, the beneficiary is responsible for supervising these employees on behalf of the petitioner. However, the job application form indicates that the beneficiary is an "applicant for employment with the [redacted] and is written on letterhead of [redacted] which appears to be a separate entity from the petitioner. This document does not establish that the beneficiary is an employee of the petitioner. Further, counsel's assertion that the petitioner hires its own employees is contradicted by the Amended and Restated Operational Services Agreement dated December 31, 2002, between the petitioner and [redacted] which states that [redacted] is responsible for the recruiting, hiring, training, promotion, assignment, supervision, management and discharge of all employees. Counsel's

---

[12] As noted in the AAO's NOID, paragraph 6 of the Amended and Restated Operational Services Agreement states in part:

> All Personnel shall remain employees of [redacted] and subject to its exclusive direction and control. [redacted] shall be responsible for the recruiting, hiring, training, promotion, assignment, supervision, management and discharge of all Personnel.... [The parties acknowledge and agree that all Personnel performing Services, whether on site at [the petitioner's] premises or not, shall at all times be solely the employees of [redacted], and at no time shall such personnel be deemed to be employees of [the petitioner].

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

[13] The petitioner has not asserted that the Amended and Restated Operational Services Agreement has been further amended.

assertion that the petitioner hires its own employees is also contradicted by the letter dated January 19, 2010, from [redacted] partners at [redacted] pursuant to which [redacted] state that [redacted] makes available the services of employees necessary to operate the petitioner's business. The letter states that the beneficiary is an employee of [redacted]. The petitioner has not resolved the inconsistencies in the record. *See Matter of Ho*, 19 I&N Dec. 582.

· Newsletters for August-September 2010. Counsel states that there are three instances of the beneficiary presenting company service awards to his co-workers at the petitioner's locations in Illinois under the title of Vice President and General Manager of the petitioner. The newsletters do not establish the petitioner's control over the beneficiary such that he may be considered an employee of the petitioner.

· Confidentiality Agreement. Counsel states that the beneficiary had to sign a confidentiality agreement with the petitioner to receive certain documents. However, the documents provided are confidentiality agreements for [redacted], not the petitioner, and do not establish that the beneficiary is an employee of the petitioner.

· Purchase order forms. Counsel asserts that the instrumentalities and tools used by the beneficiary on the job are owned and controlled by the petitioner. Counsel states that the two purchase orders submitted in response to the AAO's NOID were signed by the beneficiary as an authorized employee signatory of the petitioner, and that they represent purchases of machines used by the petitioner to run the assembly line, which is the beneficiary's responsibility. The purchase orders indicate that the beneficiary was authorized to act for the petitioner in requisitioning equipment used in the petitioner's business. However, paragraph 2 of the Amended and Restated Operational Services Agreement dated December 31, 2002, between the petitioner and [redacted] states that repair and maintenance of all facilities and equipment shall be performed or supervised by [redacted]. Thus, while the purchase orders indicate that the petitioner owns certain equipment used in its business, control over the operation, repair and maintenance of the equipment by the petitioner has not been established. The purchase order forms do not establish the petitioner's control over the beneficiary such that he may be considered to be an employee of the petitioner.

· Service Agreements between the petitioner and [redacted] Lease Agreement between the petitioner and [redacted] Agreement between the petitioner and [redacted] and Lease Agreement between the petitioner and [redacted] Counsel asserts that these agreements establish that the beneficiary was authorized to sign agreements on behalf of the petitioner, and that the service and lease agreements were for machines and uniforms used by the petitioner and the beneficiary on the petitioner's business premises. He notes that the petitioner has two locations, one in Savanna, Illinois and one in Mount Carroll, Illinois, and that the beneficiary does most of his work in the Savanna, Illinois factory. The record does not establish whether the factory where the beneficiary will work is owned by the petitioner or another entity. Further, the employees at the factory appear to be employees of [redacted] not the petitioner. The petitioner does not appear to employ anyone directly. The service and lease agreements do not establish the

petitioner's control over the beneficiary such that he may be considered to be an employee of the petitioner.

Employee expense report. Counsel asserts that although [redacted] pays the beneficiary's salary, the petitioner pays for his travel expenses. The expense reports provided by the petitioner are [redacted] employee expense reports. In handwritten language, it appears that the petitioner wrote a note on the expense reports stating that the reference to division 11 indicates that the petitioner paid the beneficiary's travel expenses. However, counsel's assertion that the petitioner pays for the beneficiary's travel expenses appears to be contradicted by the Amended and Restated Operational Services Agreement dated December 31, 2002, between the petitioner and [redacted] which states that [redacted] is solely liable for all wages and other compensation and benefits due to employees. The petitioner has not resolved the inconsistencies in the record. *See Matter of Ho*, 19 I&N Dec. 582.

All of the incidents of the relationship between the petitioner and [redacted] must be assessed and weighed with no one factor being decisive. *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992); *see also* Restatement (Second) of Agency § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003). Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established the petitioner's control over the beneficiary such that he may be considered to be an employee of the petitioner.

Counsel cites a letter dated December 20, 2000 from [redacted] of the legacy INS Office of Adjudications to counsel in another case indicating that even though an alien's salary is paid from another source, an employer can establish an employer-employee relationship if it has control over the alien. It is noted that private discussions and correspondence solicited to obtain advice from USCIS are not binding on the AAO or other USCIS adjudicators and do not have the force of law. *Matter of Izummi,* 22 I&N 169, 196-197 (Comm'r 1968); *see also,* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

Alternatively, the petitioner's counsel asserts that the petitioner is authorized to file the Form I-140 petition as an agent of its parent company, [redacted]. Counsel cites a letter from [redacted] of the legacy INS Office of Adjudications to counsel in another case indicating that if one employer leases an alien to another and both firms exercise control over the alien, the employer could file the petition if it meets the regulatory definition of an agent. As noted above, private discussions and correspondence solicited to obtain advice from USCIS are not binding on the AAO or other USCIS adjudicators and do not have the force of law. *See id.*

Further, the petitioner's counsel asserts that under corporation law, [redacted] and the petitioner may be considered a single entity. However, the petitioner, [redacted] is a Delaware limited liability company.[14] It is wholly owned by [redacted] a separate

[14] The petitioner was organized as a limited liability company in Delaware on December 18, 1995. *See* https://delecorp.delaware.gov/tin/controller (accessed June 22, 2011).

Delaware limited liability company.[15] [redacted], a Delaware corporation, owns a majority interest of [redacted] and the petitioner are not a single entity. They are separate legal entities with separate federal employer identification numbers.[17]

Counsel further states that under the Delaware LLC Act, courts allow piercing of the LLC veil, holding a member of an LLC liable for an LLC's debts and other legal obligations. Counsel cites *Westmeyer v. Flynn*, 889 N.E.2d 671 (2008), which states:

> The doctrine of piercing the corporate veil applies to Delaware corporations. "Delaware law allows a court to pierce the corporate veil of an entity when there is fraud or when a subsidiary is the alter ego of its owner." *In re Kilroy,* 357 B.R. 411, 425 (Bankr.S.D.Texas 2006); see *SR International Business Insurance Co. v. World Trade Center Properties, LLC,* 375 F.Supp.2d 238, 243 (S.D.N.Y.2005), quoting *Geyer v. Ingersoll Publications Co.,* 621 A.2d 784, 793 (Del.Ch.1992); see also *Miller v. Raytheon Aircraft Co.,* 229 S.W.3d 358 (Tex.App.2007) (under Delaware law, members of an LLC are generally not liable for the obligations of the LLC, absent a showing that the court should pierce the corporate veil).

In the instant case, piercing the corporate veil is not an appropriate tool for determining whether the petitioner will be the beneficiary's actual employer. First, fraud is not an issue in this case. Second, the petitioner is not the alter ego of MacLean-Fogg Company. The petitioner is owned by [redacted], not [redacted] Counsel has provided no precedent to suggest that even if veil piercing were appropriate in this matter, that [redacted] would be held liable for the obligations of the petitioner as an indirect owner of the petitioner. Finally, for immigration purposes, USCIS may not pierce the veil of the LLC and hold its member, [redacted] or [redacted] liable for the petitioner's debts. A limited liability company is a separate and distinct legal entity from its members. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980).

Finally, counsel states that the financial consolidation of the petitioner into [redacted] shows that they are part of a single entity. While the companies file consolidated returns for tax purposes, they are not a single entity in the context of the employer-employee relationship. The Amended and Restated Operational Services Agreement dated December 31, 2002, between the petitioner and [redacted] clearly establishes that the two entities are separate and

---

[15] [redacted] was organized as a limited liability company in the state of Delaware on November 4, 1998. *See id.*

[16] [redacted] was incorporated in Delaware on March 22, 1960. *See id.*

[17] Paragraph 10.6 of the Amended and Restated Operational Services Agreement dated December 31, 2002, between the petitioner and [redacted] states that the legal relationship created by the Agreement is that of an independent contractor, and "in no event shall it constitute a partnership, joint venture, or employer-employee relationship" between the petitioner and [redacted] Fogg Company.

distinct, and that [redacted] is, and will continue to be, the beneficiary's actual employer. The documents submitted to the record do not provide independent, objective evidence to establish that the petitioner will be the beneficiary's employer.

It is unclear that the petitioner will be the beneficiary's actual employer and was authorized to file the instant petition. The petitioner submitted no documents to establish that it pays any employee salaries. The petitioner does not appear to employ anyone directly.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.